FOURTH DIVISION
Order filed August 25, 2011
Modified upon denial of rehearing September 29, 2011

2011 IL App (1st) 101007 - U
No. 1-10-1007

IN THE APPELLATE COURT
OF ILLINOIS
FIRST JUDICIAL DISTRICT

ABM JANITORIAL SERVICES, Plaintiff-Appellant, v. MB REAL ESTATE SERVICES, LLC, NACA LIMITED PARTNERSHIP, ROCCO DITRANI and KIM DITRANI, Defendants-Appellees.	))))))))))	Appeal from the Circuit Court of Cook County No. 05 CH 18785 The Honorable Kathleen M. Pantle, Judge Presiding.

JUSTICE STERBA delivered the judgment of the court.
Presiding Justice Lavin and Justice Pucinski concurred in the judgment.

ORDER

HELD: Summary judgment in favor of MB and against ABM is reversed and remanded to the circuit court of Cook County with directions based on our determination that the indemnification provision in the Service Contractor Agreement executed by the parties requires ABM to indemnify MB for defense costs and attorney's fees and ABM's 28.7% share of the jury's verdict in the underlying DiTrani litigation.

¶ 1 Plaintiff, ABM Janitorial Services (ABM), sought an order from the circuit court of Cook County declaring that it was not obligated to defend or indemnify defendants, MB Real Estate

Services, LLC, and NACA Limited Partnership (collectively, MB), in an underlying personal injury action brought by Rocco DiTrani and Kim DiTrani (the underlying action).[1] ABM and MB had entered into a "Service Contractor Agreement" (the agreement), which included an indemnity provision. On cross-motions for summary judgment, the circuit court granted summary judgment in favor of MB and against ABM, holding that ABM must defend and indemnify MB in the underlying action, from which decision ABM appeals. For the following reasons, we reverse and remand with directions the judgment of the circuit court.

¶ 2 I. BACKGROUND

¶ 3 This declaratory judgment action arises from a dispute between ABM and MB regarding the allocation of defense costs and indemnification in the underlying action. NACA Limited Partnership (NACA) owns the building known as the Citicorp Center, located at 500 West Madison Avenue in Chicago, Illinois. The Citicorp Center is a 1.4 million-square-foot office building that sits adjacent to Ogilvie Transportation Center, a commuter train station. Nearly 100,000 commuters travel through the building on a daily basis, in addition to approximately 4,500 tenants. MB Real Estate Services, LLC, a Delaware corporation, manages the building for NACA. ABM, a Delaware corporation, provides commercial cleaning and maintenance services.

¶ 4 On August 30, 2004, ABM entered into the agreement with MB to provide cleaning and

[1] Rocco DiTrani and Kim DiTrani, the plaintiffs in the underlying action, were joined as defendants in ABM's declaratory judgment claim based on their potential interest in this matter; however, ABM seeks no relief against them.

maintenance services at the Citicorp Center. The preamble to the agreement states that ABM "is skilled in the performance of all the Contract Duties *** and has offered to perform all said Contract Duties for [MB] with respect to the property." The agreement became effective on September 1, 2004 and expired on August 31, 2007. The agreement provided that ABM "shall timely and fully perform all of the Contract Duties set forth in Exhibit A [and] further agrees to perform all of the Contract Duties in a good and workmanlike manner."

¶ 5 The "Contract Duties," as set forth in "Exhibit A," state, "[t]his request for proposal calls for the supplying of total cleaning services at 500 West Madison Chicago, Illinois." The agreement required ABM to provide its services "in a first class manner in accordance with the highest standards typical of Class 'A' office buildings in the central business district of downtown Chicago." On a daily basis, ABM agreed:

> "to furnish day porters and matrons *** to perform the following duties and any additional duties, which may be directed by [MB]:
>
> • Police entire lobby areas and outside areas. Clean loading dock areas.
>
> • Set out mats on rainy days in an orderly neat manner; keep in dry and clean condition."

¶ 6 Pertinent here, Pam Dudash, MB's general manager, testified by deposition that "[t]he system in place is that cleaning has the mats down on the 1st Floor to make sure that people coming in do not track more water onto the floor, and that they have the 'wet floor' signs down, and that they have the mops out so that they're cleaning up the water as it comes in." When asked whether ABM is required to clean up water leaking from the atrium's roof, Dudash

responded, "[the agreement] says, 'As required by [MB] from time to time,' which - - since [ABM] has been in this building for 10 to 15 years, and they have done this work for that amount of time, and that roof has leaked for that amount of time, in various areas, and they have kept the floors clean and dry that amount of time."

¶ 7 The contract duties also obligated ABM to perform snow removal:

> "Remove snow from building entrance ways, plaza and sidewalks to avoid accumulation and/or formation of ice, using 'snow melt' chemical in limited quantities. All materials and equipment to be supplied by [ABM] and shall be of type and manufacture as approved by [MB]."

¶ 8 In addition, the contract duties stated that ABM "agrees to remove all rubbish from the building and place in appropriate compaction equipment. [ABM] to implement and maintain recycling program at direction of [MB]."

¶ 9 As to lighting requirements, the contract duties provided:

> "[ABM] agrees at its cost to furnish labor and materials to replace light bulbs, tubes, ballast's [*sic*] and starters as required in all public areas, interior and exterior of building, including plaza, garage, loading dock, atrium, mechanical rooms, elevators, vacant office spaces, storage areas, and other areas as necessary. [ABM] shall provide at all times on site light bulbs, tubes, ballasts, starters and all other necessary materials and equipment to keep at a minimum burned out bulbs in the public and tenant areas.
>
> [ABM] shall expediently repair all electrical problems related to lamping under

> this contract typical of a Class A office building.
>
> [ABM] shall maintain at all times all lamping at the highest quality typical of a Class A office building."

ABM also was responsible for lighting maintenance in "all GSA tenant areas."

¶ 10 In addition to performance of the contract duties set forth in the agreement, ABM was required to "maintain, at its sole cost and expense" insurance "in a form reasonably satisfactory to [MB]." The "Contractor Insurance Requirements," attached as "Exhibit C" to the agreement, obligated ABM to obtain coverage for commercial general liability with a combined single limit of $3 million per occurrence and also stated coverage "shall be in broad form and include but not be limited to contractual liability, independent contractor's liability, products and completed operations liability and personal injury liability. *** Policies shall be primary and non-contributory." The insurance provision also required ABM to obtain an "Additional Insured Endorsement" listing MB as an additional insured. ABM was obligated to furnish MB with certificates of insurance evidencing procurement of the required insurance.

¶ 11 The indemnity provision included in the agreement states the following:

> "To the fullest extent permitted by applicable law, [ABM] shall defend, indemnify and hold harmless [MB] and their respective officers, directors, members, employees, agents, shareholders, partners, joint venturers, affiliates, successors and assigns from and against any and all liabilities, obligations, claims, demands, causes of action, losses, expenses, damages, fines, judgments, settlements and penalties, including, without limitation, costs, expenses and

attorneys' fees incident thereto, arising out of, based upon, or occasioned by or in connection with:

(a) [ABM's] performance of (or failure to perform) the Contract duties;

(b) a violation of any laws or any negligence, gross negligence or willful misconduct by [ABM] or its affiliates, subcontractors, agents or employees during performance of the Contract Duties; and/or

(c) a breach of this Agreement by [ABM] or any of its affiliates, subcontractors, agents or employees.

* * *

Except as may be otherwise provided by applicable law or any governmental authority, [MB's] right to indemnification under this section shall not be impaired or diminished by any act, omission, conduct, misconduct, negligence or default (other than gross negligence or willful misconduct) of [MB] or any employee of [MB] who contributed or may be alleged to have contributed thereto."

¶ 12 The "Contractor Insurance Requirements" exhibit attached to the agreement contained an indemnity provision with the same language. The agreement was signed by Dudash and ABM's president, Nicholas Baker.

¶ 13 To comply with the insurance and indemnification provisions included in the agreement,

ABM purchased an excess commercial general liability policy from ACE American Insurance Company (ACE), which was effective from November 1, 2004 to November 1, 2005.

¶ 14 The schedule of forms and endorsements included in the policy listed endorsement no. 8, entitled, "Additional Insured - Designated Person or Organization," which states as follows:

"SCHEDULE

Name of Person or Organization:

Any person or organization whom you have agreed to include as an additional insured in a written contract or written agreement.

WHO IS AN INSURED (Section II) is amended to include as an insured the person(s) or organization(s) shown in the Schedule as an insured but only with respect to liability arising out of your operations or premises owned or rented by you."

¶ 15 By affidavit, Katherine Lieber, ABM's risk management coordinator, testified that she was responsible for requesting and forwarding to the certificate holder the certificate of insurance documents reflecting the liability coverage obtained by ABM. She testified that, on or about October 28, 2004, she sent MB a three-page document consisting of the certificate of insurance and two additional insured endorsements referenced on the certificate of insurance as attachments.

¶ 16 The certificate of insurance provided "that policies of insurance listed below [including the excess commercial general liability policy] have been issued to the insured named above and are in force at this time." The certificate also stated that it was issued "as a matter of information

only and confers no rights upon the certificate holder. This certificate does not amend, extend or alter the coverage afforded by the polices listed below."

¶ 17 The first of the attached endorsements, entitled, "Additional Insured-Designated Person or Organization," states as follows:

"SCHEDULE

Additional Insured:

see attached cg 2010

WHO IS AN INSURED (Section II) is amended to include as an additional insured the person or organization shown in the Schedule, but only to the extent that said person or organization is indemnified by your written contract or agreement with said additional insured. The insurance with respect to such additional insured shall not exceed such coverage limits of liability in the written contract or agreement nor the coverage and limits of liability of this policy, and applies only with respect to liability arising out of your operations or premises owned by or rented to you."

¶ 18 The second attached endorsement, entitled, "Additional Insured-Owners, Lessees or Contractors (Form B)," provides:

"SCHEDULE

Name of Person or Organization:

MB Real Estate, LLC

NACA Limited Partnership

* * *

WHO IS AN INSURED (Section II) is amended to included [sic] as an insured the person or Organization shown in the Schedule, but only with respect to liability arising out of 'your work' for that insured by or for you.

Project: 500 W. Madison Street, Chicago, IL 60651 (Citicorp Center) (L050)

WHO IS AN INSURED (SECTION II) IS AMENDED TO INCLUDE AS AN ADDITIONAL INSURED THE PERSON OR ORGANIZATION SHOWN IN THE SCHEDULE, BUT ONLY TO THE EXTENT THAT SAID PERSON OR ORGANIZATION IS INDEMNIFIED BY YOUR WRITTEN CONTRACT OR AGREEMENT WITH SAID ADDITIONAL INSURED. THE INSURANCE WITH RESPECT TO SUCH ADDITIONAL INSURED SHALL NOT EXCEED SUCH COVERAGE AND LIMITS OF LIABILITY IN THE WRITTEN CONTRACT OR AGREEMENT NOR THE COVERAGE AND LIMITS OF LIABILITY OF THIS POLICY, AND APPLIES ONLY WITH RESPECT TO LIABILITY ARISING OUT OF YOUR OPERATIONS OR PREMISES OWNED BY OR RENTED TO YOU."

¶ 19 On December 7, 2004, Rocco DiTrani was walking through the atrium of the Citicorp Center when he slipped and fell, sustaining injuries. Rocco and Kim DiTrani filed an amended complaint on April 13, 2005, which alleged six separate counts of negligence against ABM, MB Real Estate Services, LLC and NACA. In each count, the DiTranis alleged that the underlying defendants were negligent in one or more of the following respects:

"a. failed to repair the leaking roof;

b. inadequately repaired the leaking roof;

c. failed to provide a tarp or other suitable device to prevent water leaking from the roof from reaching the store floor;

d. allowed and permitted the aforesaid premises to become and remain in a dangerous condition;

e. failed to warn business invitees of the presence of water on the floor of the atrium;

f. failed to place yellow floor signs, cones or other warning devices at or near the escalators when it knew or should have known that water had accumulated and was accumulating in the area prior to Plaintiff's fall;

g. failed to properly inspect or maintain the roof on the premises; and

h. failed to provide rubber mats, carpets or other similar anti-slip devices.

i. Failed to re-direct pedestrian traffic away from the water on the atrium floor."

Each of the six negligence counts alleged identical factual allegations and legal issues.

¶ 20 By affidavit, Lola Kamimura, an ACE executive underwriter, testified that she was personally responsible for underwriting and issuing the policy to ABM. She testified that endorsement no. 8 was not completely accurate because it did not represent the true scope of the additional insured coverage which ABM requested to be provided by the policy. According to Kamimura, ABM, through its broker, had requested more restrictive language, which was included in a separate endorsement, endorsement no. 46. This endorsement was not issued with

the policy on November 1, 2004. Kamimura testified that it was the intent of ACE that the more restrictive language found in endorsement no. 46 should apply, but endorsement no. 46 was not added to the policy until April 2005.

¶ 21 An April 27, 2005 e-mail communication Kamimura received from Linda Dillard of ACE stated, " I have requested the endorsements per your request. We expect to have the endorsements within 15 days." The record is unclear as to the exact date endorsement no. 46 became effective; however, it is clear that endorsement no. 46 was not issued to ABM until after Rocco DiTrani's accident.

¶ 22 Endorsement no. 46 provides:

"SCHEDULE

Name of Person or Organization:

Any person or organization whom you have agreed to include agreed [*sic*] as an additional insured in a written contract or written agreement.

WHO IS AN INSURED (Section II) is amended to include as an insured the person or organization shown in the Schedule, but only to the extent that said person or organization is indemnified by your written contract or agreement with said additional insured. The insurance with respect to such additional insured shall not exceed such coverage and limits of liability in the written contract or agreement nor the coverage and limits of liability of this policy, and applies only with respect to liability arising out of your operations or premises owned by or rented to you."

¶ 23 On May 12, 2005, MB tendered its defense of the underlying action to ABM based on the insurance and indemnification provisions in the agreement. MB's correspondence stated that, "[p]rior to the accident at issue, [ABM] entered into a contract with [MB], whereby [ABM] was responsible for maintaining the building in question." MB stated that ABM "agreed to name [MB] as additional insureds with respect to this building under its general liability policy pursuant to section 7 and Exhibit C of the contract." The correspondence also provided that ABM "agreed to defend and indemnify [MB] for any claims arising out its acts/omissions" pursuant to the indemnification provision. In addition, MB stated that the underlying plaintiff's "allegations that he slipped and fell on the premises as a result of a wet floor necessarily implicate the acts/omissions of [ABM] as the maintenance contractor for the building." ABM denied MB's tender by correspondence dated August 10, 2005.

¶ 24 On November 2, 2005, ABM filed its initial complaint for declaratory judgment against MB. ABM alleged that subsections (a), (b) and (c) of the indemnification provision do not require ABM to indemnify MB for the negligence of MB, but only for the negligence of ABM. ABM alleged that the negligence claims against MB neither mentioned any acts or omissions by ABM, nor contained allegations that MB was vicariously liable for the acts or omissions of ABM. In addition, ABM alleged that MB is covered under the ACE policy only to the extent that MB is indemnified under the indemnification provision and that, because the underlying complaint contained no allegations potentially requiring indemnification, MB is not covered by the policy. ABM's complaint referenced the policy language in endorsement no. 46, but made no mention of the less restrictive language contained in endorsement no. 8. ABM sought an

order declaring that it owes no duty to defend, indemnify or reimburse MB for any damages, costs, expenses or attorney fees stemming from the underlying action.

¶ 25 MB filed an answer and counterclaim to ABM's declaratory judgment complaint on January 25, 2006. MB alleged that Rocco DiTrani's injuries were due to the acts and omissions of ABM and that ABM was negligent by failing to: (1) warn business invitees of the presence of water on the floor; (2) place warning cones on the floor; (3) provide antislip devices on the floor; and (4) direct traffic away from the water on the floor. MB claimed that the allegations in the underlying complaint referenced the operations of ABM, thereby triggering the additional insured provision within the ACE policy.

¶ 26 In its amended complaint, filed on February 5, 2007, ABM alleged that MB knew the roof at the Citicorp Center had been leaking after heavy rains since 1989. ABM claimed that it cannot be required to indemnify MB because MB breached an implied term of the agreement that MB would refrain from knowingly and intentionally creating hazards or allowing hazards to continue without cure. ABM alleged that it cannot be required to indemnify MB because MB breached an implied covenant of good faith and fair dealing of the agreement, namely, that MB would refrain from knowingly and intentionally creating hazards or allowing hazards to continue without cure. ABM also alleged that it cannot be required to indemnify MB because public policy does not permit indemnification where an indemnitee knowingly or intentionally created a hazard or allowed the hazard to continue.

¶ 27 On September 10, 2007, ABM filed its third amended complaint for declaratory judgment. Count I alleges that MB is not entitled to defense or indemnity under the terms of the

indemnification provision of the agreement. Count II claims that MB is not entitled to defense or indemnification under the terms of the insurance provision of the agreement. Count III alternatively requests reformation of the ACE policy to reflect that endorsement no. 46 supersedes endorsement no. 8.

¶ 28 Thereafter, on September 24, 2007, MB moved for partial summary judgment against ABM on the issue of duty to defend, as the underlying action had yet to proceed to trial. MB asserted they are additional insureds under the ACE policy based on the agreement and certificate of insurance. MB argued that the allegations of the underlying complaint potentially fall within coverage. MB contended that no genuine issue of material fact existed with regard to ABM's responsibility to keep the floors at the Citicorp Center clean and dry. According to MB, it was undisputed that the underlying complaint alleged Rocco DiTrani slipped and fell on a wet floor and that the DiTranis made direct allegations of negligence against ABM, which implicated ABM's operations. MB argued that, as a result, there was no genuine issue of material fact as to the duty of ACE and ABM to defend MB as additional insureds. MB also argued that the policy affords coverage even under the language of endorsement no. 46 and that any existing ambiguity between endorsement no. 8 and endorsement no. 46 must be construed in favor of MB. In addition, MB asserted that there are no grounds for reformation.

¶ 29 On December 5, 2007, the circuit court entered partial summary judgment in favor of MB. The court held the following:

> "Contrary to ABM's position, [the agreement] does not require ABM to indemnify [MB] for [MB's] own negligence. ABM must indemnify [MB] so long

> as [MB] are held liable as a result of anything arising out of ABM's performance of [the agreement]. The duties of ABM under [the agreement] include keeping the floor clean and dry and to 'Set out mats on rainy days in an orderly and neat manner, keep in dry and clean condition. *** One of the allegations in the DiTrani First Amended Complaint is that Mr. DiTrani was injured as a result of all three defendants' negligence in failing to provide rubber mats, carpets or other similar anti-slip device. Thus, the allegations in the First Amended Complaint directly implicate [the agreement] and [MB] here may be held liable as a result of ABM's negligence. The allegations in the First Amended Complaint potentially fall within coverage and therefore ABM has a duty to defend."

¶ 30 The DiTranis prevailed at trial and the jury attributed negligence as follows:

Rocco DiTrani	18%
MB	53.3%
ABM	28.7%

¶ 31 The circuit court entered final judgment in accordance with the jury's $1,187,624.40 verdict on February 17, 2009. Cross-claims between MB and ABM were dismissed by agreement of the parties.[2]

¶ 32 Thereafter, the parties filed cross-motions for summary judgment on the issue of indemnification. MB argued that it is an additional insured under the ACE policy and that no

[2] The record does not include the cross-claims filed by MB and ABM in the underlying action.

genuine issue of material fact exists as to the duty of ACE and ABM to defend and indemnify MB as additional insureds. ABM asserted in its cross-motion that there is no triable issue of fact indicating that the damages assessed against MB in the underlying action could have arisen from ABM's negligence because the DiTranis pled separate counts of negligence against MB and ABM. In addition, ABM argued that MB failed to meet its burden of establishing insurance coverage.

¶ 33 On June 17, 2009, the circuit court entered a written order continuing the parties' motions. The court noted in its findings that the first dispute concerned whether endorsement no. 8 or endorsement no. 46 controls. The court found that the two endorsements covered the same subject matter and could not co-exist or be reconciled and, as a result, an inherent ambiguity existed. The court held that due to the inherent ambiguity, endorsement no. 8 applies because it is the less-restrictive endorsement. The court concluded that the plain language of endorsement no. 8 "demonstrates that the intent was to indemnify MB for liability arising from the acts of ABM, not for MB's own negligence." The court also held that reformation of the policy was not appropriate in this case.

¶ 34 In addition, the court found that the indemnity provision in the agreement "does not provide that ABM agreed to indemnify MB for its own negligence." The court stated that the last paragraph of the indemnity provision is "a limiting clause which does not create indemnification coverage for MB's own acts of negligence; it merely provides that the coverage agreed to in the preceding paragraphs shall not be impaired or diminished by the acts, omissions, etc. of MB." The court stated that the indemnity provision contained limiting language as

elucidated in *Buenz v. Frontline Transportation Co.,* 227 Ill. 2d 302 (2008), because "it provides indemnity for any and all claims arising out of, based upon, occasioned by or in connection with ABM's performance (or failure to perform) the Contract Duties; or ABM's violation of laws or negligence, etc.; or ABM's breach of contract."

¶ 35 Addressing the issue of whether the bases of MB's liability in the underlying action arose out of the operations of ABM, the court stated that it did not have the transcripts of the proceedings in the underlying trial for purposes of reviewing the evidence presented. For example, the court sought review of evidence that water leaked from the roof of the atrium onto the floor and whether this caused Rocco DiTrani to slip and fall. The court also sought to determine whether evidence was presented regarding whose responsibility it was to provide rubber mats, carpets or other similar antislip devices.

¶ 36 Following the June 17, 2009 order, ABM filed a supplemental response to MB's motion for summary judgment to submit additional documentation in support of its reformation claim. MB replied to the response on October 26, 2009, arguing that reformation of the ACE policy was improper because the evidence submitted showed that a mistake did not exist at the time the policy was issued.

¶ 37 On March 5, 2010, the circuit court entered its order granting MB's motion for summary judgment and denying ABM's summary judgment motion. The court held that, pursuant to the ACE policy, there is a duty to indemnify MB from any and all liability determined by the underlying litigation. The court stated:

"Endorsement No. 46 contains an inherent ambiguity. This endorsement

> first provides that [MB] are additional insureds but only to the extent that [MB] are indemnified by the contract. The contract indemnifies [MB] for any claims arising out of, based upon, occasioned by or in connection with any negligence by [ABM] or its employees, etc. during performance of the contract. * * * The contract also provides that [MB's] right to indemnification shall not be impaired or diminished by [MB's] own negligence. * * * However, Endorsement No. 46 also states that the insurance with respect to an additional insured 'applies only with respect to liability arising out of your operations.' Per one part of the endorsement, [MB's] own negligence can be indemnified, and another part of the endorsement limits indemnification to liability that arises out of [ABM's] operations. Thus Endorsement No. 46 contains an inherent ambiguity."

¶ 38 The court held that even if endorsement no. 46 is applicable, MB must be indemnified because the inherent ambiguity is construed in favor of coverage for MB. The court stated it was unnecessary to address the issue of reformation or whether endorsement no. 8 or endorsement no. 46 applies because it concluded that the duty to indemnify applies even under endorsement no. 46. ABM timely appeals.

¶ 39 II. ANALYSIS

¶ 40 On appeal, ABM argues that the circuit court erred by ruling that it owes a duty to defend MB based on allegations that were not pled against MB in the underlying action. ABM also asserts that the court erred by finding that ABM owes a duty to indemnify MB. In addition, ABM contends that, in the alternative, the ACE policy should be reformed.

¶ 41 MB responds that ABM owes a duty to defend and indemnify MB pursuant to endorsement no. 8 of the ACE policy. MB also argues that ABM owes a duty to defend and indemnify MB under endorsement no. 46. MB asserts that ABM's interpretation of endorsement no. 46 is inconsistent with the insurance and indemnification provisions in the agreement. Finally, MB contends that ABM is not entitled to reformation of the policy.

¶ 42 Our focus in the disposition of this case lies solely in the wording of the indemnification agreement between the parties and the complaint in the underlying action. At issue is whether ABM owes the duty to defend and indemnify MB in the underlying action.

¶ 43 A. Standard of Review

¶ 44 Summary judgment should be granted only if the pleadings, depositions, admissions and affidavits, construed liberally and in favor of the nonmoving party, demonstrate that no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law. 735 ILCS 5/2-1005(c) (West 2008); see also *Kajima Construction Services, Inc. v. St. Paul Fire & Marine Insurance Co.*, 227 Ill. 2d 102, 106 (2007). Summary judgment is a drastic means of disposing of litigation and should be allowed only when the right of the moving party is clear and free from doubt. *Travelers Insurance Co. v. Eljer Manufacturing, Inc.*, 197 Ill. 2d 278, 292 (2001); *Spirit of Excellence, Ltd. v. Intercargo Insurance Co.*, 334 Ill. App. 3d 136, 144-45 (2002). Reversal of summary judgment is warranted if, on review, a material issue of fact or an inaccurate interpretation of the law exists. *Spirit of Excellence*, 334 Ill. App. 3d at 145. The construction, interpretation or legal effect of a contract is a matter to be decided by the court as a question of law. *Avery v. State Farm Mutual Automobile Insurance Co.*, 216 Ill. 2d 100, 129

(2005). Parties filing cross-motions for summary judgment invite the circuit court to determine the issues presented in the case as questions of law. *McNiff v. Millard Maintenance Service Co.*, 303 Ill. App. 3d 1074, 1077 (1999). Review of an order granting summary judgment is *de novo*. *Midstate Siding & Window Co. v. Rogers*, 204 Ill. 2d 314, 319 (2003); *Outboard Marine Corp. v. Liberty Mutual Insurance Co.*, 154 Ill. 2d 90, 102 (1992).

¶ 45 B. ABM's Duty to Defend and Indemnify Under the Agreement

¶ 46 An indemnity agreement is a contract that is subject to general rules of contract interpretation. *Buenz*, 227 Ill. 2d at 308. The cardinal rule of contract interpretation is to give effect to the parties' intent, which is to be discerned from the contract language. *Id*. If the contract language is unambiguous, it should be given its plain and ordinary meaning. *Id*.

¶ 47 "Illinois law generally provides that contracts of indemnity against one's own negligence are valid and enforceable." *Nicor Gas Co. v. Village of Wilmette*, 379 Ill. App. 3d 925, 929 (2008). Illinois courts consistently have held, however, "that indemnification contracts will not be construed as indemnifying against a party's own negligence unless such construction is required by clear and explicit language of the contract, or such an intention is expressed in unequivocal terms." *McNiff*, 303 Ill. App. 3d at 1077; see also *Blackshare v. Banfield*, 367 Ill. App. 3d 1077, 1079 (2006). If clear and explicit language is not present, "indemnification will be limited to the liability arising out of the indemnitor's negligence only." *Blackshare*, 367 Ill. App. 3d at 1079. The indemnity agreement "must be given a fair and reasonable interpretation based upon a consideration of all the language and provisions." *Hankins v. Pekin Insurance Co.*, 305 Ill. App. 3d 1088, 1093 (1999); see also *Zadak v. Cannon*, 59 Ill. 2d 118, 121-22 (1974);

Tatar v. Maxon Construction Co., 54 Ill. 2d 64, 67 (1973).

¶ 48 In *Tatar*, the indemnity clause at issue covered all claims "by reason of, arising out of, or connected with, accidents, injuries, or damages, which may occur upon or about the Subcontractor's work." *Tatar*, 54 Ill. 2d at 66. There, the supreme court ruled that the indemnity provision did not include indemnity against one's own negligence. *Id*. at 68.

¶ 49 Similarly, in *Zadak*, the supreme court found that the pertinent indemnity provision, which stated, "seller also will indemnify and hold harmless the buyer of and from any and all suits, claims, liens, damages, taxes or demands whatsoever arising out of any such work covered by, necessitated or performed under this order," did not cover one's own negligence. *Zadak*, 59 Ill. 2d at 122.

¶ 50 More recently, in *Blackshare*, a third-party action was brought by Southern Illinois Power Cooperative (SIPC) against Keith Martin, Inc. (Keith Martin), for contribution and indemnification arising out of a written contract between the parties relating to electrical work at a power-generating station owned by SIPC. SIPC sought indemnity from Keith Martin, including for SIPC's own negligence. Keith Martin moved to strike SIPC's action, which the circuit court denied after concluding the pertinent language in the contract was sufficient to entitle SIPC to complete indemnification if Keith Martin were to be found at least partially at fault.

¶ 51 On appeal, a certified question was presented to the reviewing court:

"Does the contractual indemnity clause relied on by [SIPC], which states:

'Contractor shall defend and indemnify and save Owner and all of Owner's

> employees harmless from any and all claims, losses, damages, demands, suits, actions, payments, judgment, costs[,] and expenses, including attorneys' fees, arising or alleged to arise from personal injuries, including death, or damage to property, occurring during the performance of the work and due to the negligent acts or omissions of the Contractor'
>
> allow [SIPC] to recover indemnity from [Keith Martin] if [Keith Martin] is found guilty of any negligence which proximately caused injury to [employee]?"
>
> *Blackshare*, 367 Ill. App. 3d at 1078.

¶ 52 SIPC argued on appeal that it was entitled to complete indemnification from Keith Martin if Keith Martin was found guilty of any negligence which proximately caused injury to the employee. Keith Martin asserted that the language of the indemnification provision limited its indemnity obligations to a percentage of Keith Martin's own negligence and did not extend to include indemnification for SIPC's own negligence.

¶ 53 The *Blackshare* court noted that the critical language at issue limited the promise to indemnify for damages "due to the negligent acts or omissions of the Contractor." *Id*. at 1079. The court found the parties did not intend for Keith Martin to indemnify SIPC for SIPC's own negligence; rather, Keith Martin was obligated to indemnify SIPC "for that portion of any damages or injuries attributed to Keith Martin's negligence only." *Id*.

¶ 54 In the case at bar, the indemnification provision likewise contains language that limits the promise to indemnify for, *inter alia*, liabilities, damages and attorney's fees, to claims "arising out of, based upon, or occasioned by or in connection with *** [ABM's] performance of (or

failure to perform) the Contract duties," and "a violation of any laws or any negligence, gross negligence or willful misconduct by [ABM]." In contrast to the above-discussed cases, however, the instant indemnification provision includes additional language that states, "[e]xcept as may be otherwise provided by applicable law or any governmental authority, [MB's] right to indemnification under this section shall not be impaired or diminished by any act, omission, conduct, misconduct, negligence or default (other than gross negligence or willful misconduct) of [MB] or any employee of [MB] who contributed or may have alleged to have contributed thereto." We conclude that this language is further evidence of the parties' intent to limit ABM's indemnity obligation to its own negligence rather than extend coverage of the indemnity obligation to MB's own negligence. This language merely provides that in the event MB's actions are found to be negligent, MB's own negligence will not impair MB's ability to recover under the indemnification provision from ABM for ABM's own negligence.

¶ 55 Moreover, the additional language providing that MB's right to indemnification "shall not be impaired" is not implicated here because the underlying complaint did not allege that MB was vicariously liable for ABM's negligence. See *Jandrisits v. Village of River Grove*, 283 Ill. App. 3d 152, 157 (1996). Generally, "one who employs an independent contractor is not liable for the acts or omissions of the latter." *Martens v. MCL Construction Corp.*, 347 Ill. App. 3d 303, 313 (2004). The underlying complaint against MB alleges direct liability attributable solely to MB's own negligence and the jury found MB liable for its own negligence, and allocated its percentage of fault at 53.3%. The record is devoid of a special interrogatory for any imputed liability by MB for ABM's negligence. As such, we conclude that ABM is only obligated to indemnify MB

for defense costs in the underlying action and damages according to the percentage of fault that was assessed to ABM, in this case, 28.7% of the jury's verdict. *Blackshare*, 367 Ill. App. 3d at 1079.

¶ 56 In an order we filed pursuant to Supreme Court Rule 23 (S. Ct. R. 23 (eff. 7/1/11)) on August 25, 2011, we concluded that, based on the language in the indemnification provision in the agreement, ABM was obligated to indemnify MB for MB's defense costs and attorney's fees in the underlying action and for ABM's portion of damages attributed to its own negligence, which was 28.7% of the jury's verdict. We also concluded that MB was liable for its own 53.3% share of the jury's verdict. We reversed and remanded the decision of the circuit court of Cook County and directed it to: "(1) enter an order granting summary judgment in favor of ABM and against MB in conformance with our holding herein, with a finding that ABM must indemnify MB for defense costs and attorney's fees in the underlying action, in addition to ABM's 28.7% share of the jury's verdict; and (2) determine defense costs and attorney's fees from the underlying action owed by ABM to MB."

¶ 57 On September 15, 2011, ABM filed a petition for rehearing (solely for the purpose of seeking clarification) claiming a latent ambiguity existed in our decision stemming from the fact that the parties to this appeal failed to inform this court "that ABM and MB have already paid in full their respective shares of the underlying judgment to the plaintiffs." In other words, ABM paid its 28.7% share and MB paid its 53.3% share. ABM seeks a clarifying ruling with regard to the indemnification issue. ABM asserts that it would not be obligated to pay MB anything for indemnification because ABM already paid its share of the jury's verdict. ABM requests that

this court modify the August 25, 2011 order to state that ABM is not obligated to pay any additional amounts for indemnification with respect to the underlying judgment since it has already paid its share of the total damages.

¶ 58 We conclude that this Court's order of August 25, 2011 is clear. We specifically held that ABM is obligated to indemnify MB for ABM's 28.7% portion of the jury verdict and MB is liable for its own 53.3% portion of the jury verdict. Quite obviously, if ABM has already paid its 28.7% share of the jury verdict, nothing more is due and owing MB, other than defense costs and attorney's fees from the underlying action owed by ABM to MB. Of course, if ABM produces evidence of payment of its 28.7% share of the verdict to the circuit court, its obligation in that regard will be deemed satisfied.

¶ 59 Accordingly, we deny ABM's petition for rehearing, but modify our order on denial of rehearing to provide further insight to ABM regarding what, in our view, is self-evident. The decision of the circuit court of Cook County is reversed and remanded with directions.

¶ 60 III. CONCLUSION

¶ 61 For the foregoing reasons, we reverse and remand with directions the judgment of the circuit court of Cook County. On remand, the circuit court is directed to: (1) enter an order granting summary judgment in favor of ABM and against MB in conformance with our holding herein, with a finding that ABM must indemnify MB for defense costs and attorney's fees in the underlying action and that ABM is required to indemnify MB for ABM's 28.7% share of the jury's verdict pursuant to the agreement; and (2) determine defense costs and attorney's fees from the underlying action owed by ABM to MB.

¶ 62 Reversed and remanded with directions.